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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (A. 457-501) is reported at 449 F. Supp. 449.

JURISDICTION

The judgment and order of the three-judge district court, holding unconstitutional in its entirety and enjoining enforcement of the Arizona Agricultural Employment Relations Act (AERA) Arizona Revised Statutes Sections 23-1381 through 23-1395 (Supp. 1978), (A. 502-539) was entered on April 20, 1978. The notice of appeal was filed on June 13, 1978, and the Jurisdictional Statement was filed on August 8, 1978. The Court's order postponing further consideration of the jurisdiction question to the hearing of the case on the merits was entered on October 10, 1978.

Jurisdiction to consider the correctness of the lower court's judgment is conferred on this Court by 28 U.S.C. Section 1253 (1970). There is a jurisdictional issue. If, as appellants contend, there is no case or controversy, then under Article III of the Constitution, neither the district court nor this Court has jurisdiction to decide the substantive issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Seventh Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution provide in pertinent part:

> *First Amendment:* "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble ...."
>
> *Seventh Amendment:* "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
>
> *Fourteenth Amendment:* "[N]or shall any State deprive any person of life, liberty, or property, without due process of law ...."

The full text of Arizona's Agricultural Employment Relations Act is set forth at in the Appendix at page xxxx.

QUESTIONS PRESENTED

1. Whether an Article III case or controversy is presented by a lawsuit challenging in its entirety a comprehensive agricultural labor regulatory statute, where the lawsuit was filed prior to the appointment of the Agricultural Employment Relations Board and prior to adoption of any regulations; where not one of the five statutory provisions held constitutionally defective has ever been applied to any of the plaintiffs; and where the record consists almost entirely of widely differing speculation concerning how the statute might be applied.

2. Most of the district court's constitutional rulings depend upon its interpretations of the state statute that it invalidated. In each instance, the court chose the interpretation that raised, rather than avoided, the constitutional questions. The second question presented is whether under these circumstances the district court had an obligation either to abstain or to adopt that version of state law that would save the statute rather than invalidate it.

3. Whether the election procedures provided by Arizona's Agricultural Employment Relations Act can be held to violate the right of freedom of assembly, on the basis of assumed but unproven delays in holding elections, where the challenged procedures are virtually identical to those of the National Labor Relations Act (NLRA), and where the asserted reason for the significance of delay — peak employment seasons of short duration — is equally applicable to an important segment of NLRA coverage.

4. Whether a state labor statute's extension of the proviso in section 8(b)(4)(ii)(B) of the NLRA, which permits truthful secondary consumer pressures, to a prohibition against untruthful, dishonest and deceptive secondary consumer pressures renders it unconstitutional.

5. Whether under this Court's holdings in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), and others, federal courts are to determine issues of union access to employers' property by taking into account all relevant considerations, including the availability of other means of communication, or whether the issue may be decided without regard to the facts of the particular case.

6. Whether for the first time in history the Seventh Amendment should be held binding on the states, and if so, whether compulsory arbitration in the narrow circumstances of section 1393 B of the Arizona Agricultural Employment Relations Act violates the Seventh Amendment or substantive due process.

7. Whether the district court's determination that all or parts of four out of fifteen sections of Arizona's Agricultural Employment Relations Act (and one out of twenty unfair labor practices) were unconstitutional, justified its invalidation of the entire Act, when most of the remaining provisions are functionally separate and independent.

STATEMENT OF THE CASE

The National Labor Relations Act excludes agricultural laborers from its coverage.[1] During its 1971 session, the Arizona Legislature first attempted to deal with the serious problems resulting from the absence of a labor law protecting an important segment of the State's work force. Because there was no governmentally controlled and supervised procedure for workers to choose their bargaining representative, representation questions were settled as a matter of economic might, rather than free choice. The Legislature was unable to reach a consensus in 1971.

In May of 1972, following extensive hearings and debates in which the views of all interested parties were considered, the Legislature enacted the Agricultural Employment Relations Act (AERA). It is a comprehensive labor statute, modeled after the NLRA in its overall structure and operation, but tailored in many respects to the peculiar conditions of agricultural labor. The Act defines persons and activities subject to its coverage,[2] specifies and prohibits un-

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[1] Section 2(3), 29 U.S.C. § 152(3) (1970).

[2] Ariz. Rev. Stat. § 23-1382 (Supp. 1978) (A. 505).

fair labor practices by employers[3] and unions,[4] and defines the obligation of each to engage in collective bargaining.[5] It provides procedures for secret ballot elections virtually identical to those of the NLRA.[6] It also establishes an agricultural employment relations board (Board),[7] and gives it power to hold hearings,[8] conduct elections and certify the results,[9] issue cease and desist orders,[10] order reinstatement and back pay,[11] supervise elections,[12] prohibit unfair labor practices,[13] and generally to implement the statute.

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[3] *Id.* at § 12-1385 A (A. 510).
[4] *Id.* at § 23-1385 B (A. 511).
[5] *Id.* at § 23-1385 D and E (A. 516).
[6] *Id.* at § 23-1389 (A. 522).
[7] *Id.* at § 23-1386 (A. 518).
[8] *Id.* at § 23-1387 C and § 23-1390 (A. 521, 526).
[9] *Id.*
[10] *Id.* at § 23-1390 C (A. 527).
[11] *Id.*
[12] *Id.* at § 23-1389 (A. 522).
[13] *Id.* at § 23-1390 (A. 526).

The complaint in this case,[14] challenging the statute on numerous constitutional grounds, was filed about three months after the statute had been signed into law. At that time, there were no regulations, the Board had not been appointed, and there had been no enforcement of the law. Subsequently, the Board was appointed, regulations were adopted, and there has been some enforcement of the Act. Approximately one year after the complaint was filed, it was replaced by an amended complaint.

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[14] The lower court's opinion describes the parties:

> Plaintiffs in this action are the United Farm Workers National Union (U.F.W.), on behalf of itself and its members; Gustavo Gutierrez, an agent of the U.F.W. in the State of Arizona; Ruben Alaniz and Matilda Varela, farm workers, on behalf of themselves and all other farm workers; and Wendy Rose, an individual supporter of the U.F.W., on behalf of herself and all other similarly situated U.F.W. supporters.
>
> Defendants are Bruce Babbitt, Governor of the State of Arizona; Jack La Sotta, [sic] Acting Attorney General; Bert [sic] Fleming, Treasurer; Raymond Long, Finance Commissioner; Gene Blake, William S. Boice, Jack Montgomery, Keith Walton, Jack McManus, Milton G. Sanders, individually and as members of the Arizona Agricultural Relations Board; and Theresa Bond, in her capacity as Executive Secretary of the Board. (A. 458)

In addition, the Arizona Farm Bureau Federation, an Arizona corporation, the Arizona Grape Growers' Association, an Arizona corporation, the Vegetable Growers' Association, an Arizona corporation, and the Yuma Citrus Shippers' Association, an unincorporated association, were permitted to intervene as defendants. *Id.*

The district court did not determine this case to be a class action.

Just prior to the trial of this case, in January of 1977, the parties entered into a Stipulated Statement of Status of Past and Pending Actions Taken in Accordance with the Agricultural Employment Relations Act (Enforcement Stipulation) (A. 79) describing the twenty instances in which there had been some kind of enforcement of the Act.

None of those twenty is involved in this litigation. Moreover, as described more fully below, none involved application to any of these plaintiffs of any of the five statutory provisions held unconstitutional by the district court.

Three of the five invalidated sections—section 1385 C (dealing with availability of the employer's materials, information, time or facilities to facilitate union communication with employees), section 1392 (providing criminal penalties for violation of the act) and section 1393 B (dealing with binding arbitration)—were not involved in any way in any of the twenty cases. The fourth provision, section 1385 B 8, prohibiting secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity" was involved in the pleadings in only one case, designated as case no. 2. In that case, the state court neither interpreted nor enforced that unfair labor practice because of its conclusion "that the Union's publicity is a sufficient compliance with subsection 8."[15] The appellees have implied that other cases, specifically, cases 7 and 13 of the Enforcement Stipulation also involved application of this provision which makes the use of dishonest, untruthful and deceptive publicity an

[15] Enforcement Stipulation, Exhibit 2A (A. 102).

unfair labor practice. (See Motion to Affirm 20 n.15; Motion to Affirm 33 n.29.). The record does not sustain this implication. Other parts of section 23-1385 B — which covers all union unfair labor practices — were involved in those cases, but subsection 8 was not. The only unfair labor practice provision held unconstitutional by the district court was subsection 1385 B 8, and this particular provision has never been interpreted or applied either to the appellees or anyone else.

The Enforcement Stipulation shows there has been some experience with the fifth provision held unconstitutional by the district court, section 1389, dealing with election procedures. Importantly, however, none of the elections has involved any of the plaintiffs in this case, and in none was there any suggestion of problems resulting from time delays.[16]

The trial was held before a three-judge district court. Most of the evidence presented at the trial consisted of the expression of views speculating as to the results that might be expected under certain provi-

[16] The motion to Affirm attempts to dispute this fact without really disputing it. The Motion to Affirm asserts: "The only contested election even scheduled was set for one week after the harvest and after the majority of the workers had left." Motion to Affirm 33 n.29. In making this assertion, appellees imply that the union involved, the Teamsters, withdrew its election petition for that reason. There is no support in the record for this implication. In any event, the implication is irrelevant, because the record is devoid of any suggestion that in any election held under the Act, time delays have resulted in unfairness. *See* Enforcement Stipulation case no. 5 (A. 83) and Stipulation Regarding Harvest and Pre-Harvest Seasons, Data from Cactus Distributors (A. 229).

sions of the Act if and when they were actually applied.[17] This testimony necessarily rested on two assumptions:

1. The interpretation that the Arizona courts would place on several key provisions whose meaning was, and still is, in dispute.[18]

2. The effect of those provisions — once interpreted by the Arizona courts and applied by the Board — on agricultural employment conditions and relationships in Arizona.[19]

It is not surprising that the "expert opinions" built on such a combination of speculations varied greatly. Regarding the question considered most important by the district court — the minimum time that would expire between the filing of the election petition and the holding of an election — the defendant's "expert," a retired NLRB official, concluded that the period

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[17] The witnesses were Mr. Cesar Chavez, President of the plaintiff United Farm Workers Union, two labor lawyers, one offered by each side, an agricultural field supervisor, and an agricultural economist.

[18] Concerning access to the employer's property, for example, one of the issues on this appeal, Mr. Chavez acknowledged that "whether it [access] is denied or not is a matter of legal interpretation." (A. 406). Mr. Chavez repeatedly stated that adverse effects from the statute were based on assumptions concerning how it would be interpreted. See, *e.g.*, A. 370-72, 384-86, 401.

[19] Some of Mr. Chavez' views were based on interpretations of the law given by his attorneys. See, *e.g.*, A. 407. Referring to a particular provision dealing with management rights Mr. Chavez stated: "I don't know what it means but if it means what I think it to mean, then it would have a very bad effect on the Union." A. 384.

could, if necessary, be shortened to as few as eight days. "Experts" for the plaintiffs concluded that it would be much longer.

The expert opinions were not based on actual experiences with elections that had in fact been held. All involved attempts to construct hypothetical models concerning how much time might be required to conduct elections under the Act, given certain factual assumptions, and given the experts' differing views concerning the meaning of the statute.

The plaintiffs attempted to blunt the obvious case or controversy problems resulting from their attempt to have a federal court pass on the constitutionality of statutory provisions in the absence of actual application of any of these provisions in the action before the court, by pointing to the Enforcement Stipulation (A. 79). The twenty cases covered by that stipulation fall into three categories:

1. Eight of the cases, numbers 1, 2, 3, 7, 11, 12, 13, and 20 were attempts to prevent allegedly illegal secondary boycotts. In each of these cases the defendant, or the party charged, was the appellee U.F.W., and in each, the plaintiff or the charging party relied on some portion or portions of section 1385 B, which prohibits thirteen separate union unfair labor practices. As discussed above, however, none of the cases involved the interpretation or enforcement of section 1385 B 8, the only union unfair labor practice provision held unconstitutional by the district court.

2. Six of the cases, numbers 4, 5, 6, 8, 9, and 10, involved election procedures. None of the plaintiffs in this case was involved in any of those elections. In none of the six cases was there an assertion that delay created any problems.

3. The remaining six cases, numbers 14, 15, 16, 17, 18, and 19, all involved unfair labor practice proceedings against employers under section 1385 A.

Thus, of the five statutory provisions found constitutionally defective by the lower court the only one involved in any of the enforcement proceedings was section 1389, which deals with elections. Not one of these plaintiffs was involved in any way in any of those elections or any other election under the statute that they challenge. In none of the six election cases covered by the stipulation was there any allegation of unfairness because of delays.

By the time the briefs were filed following the trial, the plaintiffs had reduced to nine their challenges to

various parts of the Act.[20] The Court held three parts of the statute unconstitutional on their face, and invalidated two others in light of testimony at the trial concerning how the Act might function. Most of the court's holdings also rested on assumptions as to how the Arizona courts might interpret the relevant provisions. The sections held invalid on their face were:

1. Section 1385 B 8, prohibiting secondary consumer pressures "by the use of dishonest, untruthful and deceptive publicity."

2. Section 1392, which provides criminal penalties for violations of the Act.

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[20] In the words of the district court:

In particular, plaintiffs' arguments deal with nine separate issues and at least as many provisions of the AERA in support of their contention that the AERA is unconstitutional. Those issues and the statutory provisions dealt with are: (1) A.R.S. § 23-1385(B) (6) and (7) [generally dealing with secondary boycotts as an unfair labor practice]; (2) A.R.S. § 23-1385(B) (8) [publicity directed at the ultimate consumer regarding nonuse of agricultural product as an unfair labor practice]; (3) A.R.S. § 23-1385 (B) (12) [recognitional picketing as an unfair labor practice]; (4) A.R.S. § 23-1389 [employee representation and election procedures]; (5) A.R.S. § 23-1385(C) [access by union to workers on employer property]; (6) A.R.S. § 23-1382 (1) [exclusion of stitchers and haulers and others from AERA]; (7) A.R.S. §§ 23-1384, 23-1385 (B) (11), 23-1385(D) [elimination of "management rights" from bargaining process]; (8) A.R.S. §§ 23-1385(B) (13), 23-1393(B) [restriction and prohibition against striking and picketing]; and finally, (9) A.R.S. § 23-1392 [criminal penalties for violation of the Act]. (A. 459).

3. Section 1393 B, requiring that any employer who seeks a ten-day restraining order against a strike during harvest must, as a condition, agree to submit the dispute to binding arbitration.

The provisions held unconstitutional in light of the evidence were:

1. That part of section 1385 C which provides that neither an employer nor a labor organization shall be required to make available to the other "materials, information, time or facilities" for the purpose of communicating with employees.

2. All of section 1389, dealing with representation and elections.

Judge Craig wrote a separate opinion styled a concurrence, taking the position that the court should have abstained, "in order that the Supreme Court of Arizona might first express its opinion with respect to the constitutionality of the law established by the Arizona State Legislature." (A. 501).

On consideration of the jurisdictional issue, this Court entered its order that "further consideration of the question of the jurisdiction is postponed to the hearing of the case on the merits."

SUMMARY OF ARGUMENT

The district court should never have considered this case at all. The constitutionality of the invalidated provisions depends on state law that has not been declared and facts that have not occurred.

Foundational to American constitutional adjudication are the principles that statutes must be construed so as to save rather than destroy, and that constitutional issues should be avoided if possible. The district court acted squarely contrary to each of these principles.

This is a comprehensive, multi-faceted statute, consisting of many separate policy determinations, interrelated in the sense that they represent part of a total effort to deal with the problems of agricultural labor. The appellees attacked many separate provisions. The district court agreed with them as to five provisions. Not one of those five provisions has ever been applied to any of these plaintiffs. The district court's holding of unconstitutionality on that kind of record is unique among federal judicial decisions. In the six years of this litigation, the appellees have not suggested a single case in which this Court has authorized wholesale, checklist review of a comprehensive regulatory statute. In two cases involving labor statutes, and in numerous other cases, the Court has specifically rejected such an approach as inconsistent with the case or controversy requirement.

The district court's handling of the constitutional issues in this case frequently depended on how this state statute would be interpreted. In every single instance, the court interpreted the statute in such a way that the constitutional issue was raised rather than avoided, and in such a way that the constitutional concerns were heightened rather than lessened. And in no instance was the court aided by state court interpretations of the Act.

Even given the district court's unfounded, though necessary, assumptions of fact and assumptions of Arizona state law, its constitutional holdings concerning all five provisions are in error.

There is not much authority dealing with the prohibition of falsehood, including prior restraints, in the labor setting. The limited authority that exists, however, indicates that such falsehood can be constitutionally prohibited, even where prior restraints are involved. In any event, the maximum protection to which falsehood is entitled is the protection afforded by the *Times Libel* standard. Whether the *Times Libel* standard—knowing falsity or reckless disregard—is satisfied will necessarily vary according to the facts of the individual case. Here, there are no facts and there is no individual case.

There is no material difference between the election procedures at issue in this case and those of the NLRA. The key to the district court's holding that these procedures are unconstitutional is the shortness of some agricultural harvest seasons: for some crops the election procedures will take longer than the period of peak agricultural employment. This is not a problem that exists in every agricultural labor election, however, and it is not limited to agricultural labor. It is a problem with which the National Labor Relations Board must deal with some frequency.

There are several possible solutions to the seasonality problem. At one end of the spectrum, the California Agriculture Labor Relations Act requires that the election be held within seven days after the petition is filed, with all issues that cannot be decided during the seven-day period deferred until after the

election. The National Labor Relations Board takes another approach. It holds the elections during the current season if feasible, and if not, the election is postponed until the next peak season. The Arizona procedure steers a middle course between the two. The Arizona Board has authority to order an immediate election if appropriate in the particular case, or to postpone until the next employment peak. Assuming the constitutionality of both the national model and the California model, the district court's holding is patently erroneous. That court held unconstitutional, regardless of how applied, a procedure that permits the labor board to apply either the California model or the national model, depending on the peculiar needs and circumstances of the individual case.

This Court has made it very clear that under the National Labor Relations Act, union access to employer premises for the purpose of communicating with employees depends upon the facts and circumstances of the individual case. The most important facts and circumstances are the availability of other channels of communication, and whether the employer has discriminated against the union by allowing other distribution on its premises. Even assuming what no court has ever held, that these NLRA standards are constitutionally required, constitutionality of the AERA provision dealing with access to employer "materials, information, time, or facilities" must depend on the facts of the individual case, and cannot be decided as a general abstract matter. In some cases, alternative channels of communication will be ade-

quate. In others, they will not. But it is impossible even as a theoretical matter to decide these issues except on a case-by-case basis.

The district court and the appellees interpret the Act, erroneously in our view, to create in the employer a right to force the union to arbitrate disputes. The district court held that this presumed right of compulsory arbitration violates constitutional rights to a jury trial under the Seventh Amendment and the Due Process Clause of the Fourteenth Amendment. Nothing in the statute, however, should be interpreted as forcing the union to arbitrate.

The district court's opinion contains neither the word "incorporation" nor the words "substantive due process", and the appellees have made a valiant and an understandable effort to persuade that neither of these issues is involved. It is, however, an effort to avoid the unavoidable: Seventh Amendment rights invalidate state legislation only if (1) the Seventh Amendment is incorporated into the Fourteenth or (2) *Barron v. Baltimore* has been overruled. Similarly, if compulsory arbitration violates due process, it must be substantive due process. The cases on which the opinion relies are substantive due process cases, from the substantive due process era. Decisions in this Court and other federal courts make it very clear that state statutes providing for compulsory arbitration are not outside the scope of permissible state policy making.

Even if the district court had not erred in deciding this case in the abstract, in consistently reaching out for the interpretation of state law that invalidated, and in holding five provisions of the statute unconstitutional, it still should not have invalidated the entire Act.

Whatever may have been the approach under the older cases (from the 1930's) relied on by the appellees, the Court today properly treats severability as a corollary of the broader principle that statutes should be interpreted so as to save rather than to destroy. Applying that principle to the instant case, it is clear that the invalidity of five segments of this comprehensive labor code do not obliterate the legislature's entire work product. The statute consists of many separate policy determinations made by the Arizona legislature. They are interrelated in the sense that they constitute parts of a complete act, but most, if not all of them represent separate policy judgments that do not depend on other parts of the statute. The point is perhaps best illustrated by the unfair labor practice provisions. The Arizona legislature prohibited a total of twenty unfair labor practices, some by employers and some by unions. Even a cursory examination of those unfair labor practices reveals that they represent separate and independent legislative judgments. The legislature determined that the commission of any one of these practices is against the policy of the State of Arizona. The district court held only one of them unconstitutional. Yet it invalidated all twenty, even though none of the other nineteen depends on the one invalidated, and most of them are not even remotely

connected to it. Once again, the district court has violated its obligation to save rather than to destroy, and to avoid constitutional issues rather than raise them.

ARGUMENT

I.

THE PRESENT DISPUTE IS NOT A CASE OR CONTROVERSY. THE DISTRICT COURT THEREFORE LACKED JURISDICTION TO DECIDE IT.

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. If a disagreement does not rise to the level of a case or controversy, federal courts lack jurisdiction to decide it. This Court stated in *Powell v. McCormack*, 395 U.S. 486, 512-513 (1969), "In Baker v. Carr . . . we noted that a federal district court lacks jurisdiction over the subject matter . . . if it is not a 'case or controversy' within the meaning of that phrase in Art. III . . . ." This Court, of course, has jurisdiction to review the district court's holding that it could exercise jurisdiction.

Central to the case or controversy limitation is the principle that federal courts have jurisdiction to decide only those issues that are necessary to the resolution of actual, concrete controversies. As this Court stated in *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947):

> [C]onstitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance

> of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.

That principle was not followed by the district court. This case is wholly hypothetical. There are no specific pertinent facts, no application of provisions of the statute to these plaintiffs, no individual pointing to facts on the record demonstrating how his constitutional rights have been affected by the application of the statute to those facts. Totally lacking in this case, therefore, is the Article III requirement that questions come into federal court only after they have been sharpened by actual disputes between the parties to the litigation.

The "record" consists almost entirely of widely varying expressions of opinion concerning what kinds of results might be expected from application of different provisions of the statute. It is not surprising that the views of the experts varied. The main evidentiary issue at the trial, and the most important factual element in the lower court's decision, concerned how long it might take to hold elections under the Arizona Act. There were no actual facts on that issue, because the court was not dealing with any particular election. The expert opinion concerning how long it might take varied from slightly over a week to a much longer, though unspecified, period. The court adopted the view of the evidence that in its opinion rendered the statute unconstitutional.

Armed with that kind of record the court proceeded to wade through a catalogue of objections to numerous sections of the statute. It found five parts, including two sections and parts of two others unconstitutional. The court then declared that the entire statute—including parts whose operation and purpose have no conceivable dependence on the sections invalidated—must fall.

This, we submit, is not case or controversy adjudication. Indeed, it is very close to the Council of Revision approach rejected by the constitutional convention, an approach under which newly enacted statutes would have been reviewed for constitutionality prior to their operation by a panel composed in part of judges.[21]

We know of no case—and in the six years of this litigation the appellees have discovered none—in which this Court has approved the wholesale consideration of the constitutionality of a comprehensive regulatory statute, each of whose challenged provisions raises separate constitutional issues, in advance of, and in

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[21] The eighth resolution in the Virginia Plan proposed to the constitutional convention of 1787 provided in pertinent part:

> that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again Negatived by an _____ [blank left in original] of the members of each branch. I Farrand, *The Records of the Federal Convention of 1787*, 21 (1966).

the absence of, the application of those provisions. The approach to that kind of statute has always been to consider the individual provisions as each is involved in concrete factual settings raising the constitutional issues of which the plaintiffs complain.

In two cases the Court has considered challenges to comprehensive labor regulatory statutes apart from the enforcement of specific provisions. *A.F.L. v. Watson*, 327 U.S. 582 (1946), and *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). In both cases the Court refused to entertain the broadside attack.

In *McAdory*, an Alabama state labor organization sought a declaratory judgment concerning the constitutional validity of certain sections of that State's newly enacted Bradford Act. The Bradford Act was described by this Court as "a comprehensive enactment regulating labor unions having members who are employees working in the State of Alabama." 325 U.S. at 455. The Act required labor organizations coming within its provisions to file various reports and financial statements and to pay filing fees. It also regulated "some phases of the internal affairs and activities of labor organizations, and various aspects of picketing, boycotting and striking." *Id.* The plaintiffs contended that the Act violated their rights of free speech and assembly. "Specifically they argue[d] that if they fail to file any of the statements required by § 7 and afterwords function as a labor union within the state, by exercising their right of free speech and assembly, they may be subjected to the criminal penalties imposed by

§ 18, and may also be enjoined from so functioning by a civil suit in equity in the state courts." 325 U.S. at 458.

In a unanimous opinion authored by Chief Justice Stone, the writ of certiorari was dismissed because "[w]e would not have granted certiorari to review so unsubstantial a question. . . ." 325 U.S. at 472.[22] Citing language from its earlier decision in *Watson v. Buck*, 313 U.S. 387, 402 (1941), this Court observed that, " 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications [which had not yet occurred]' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' " 325 U.S. at 462. Under these circumstances, constitutional adjudication was improper:

> All these considerations forbid our deciding here the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. *Id.*

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[22] The Court described its grant of certiorari as follows: "We granted certiorari, 323 U.S. 703, upon a petition which presented the contentions that §§ 7 and 16 impose a prior general restraint from petitioners' freedom of speech and assembly guaranteed by the First and Fourteenth Amendments to the Constitution. . . ." 325 U.S. at 454.

The appellees attempt to distinguish *McAdory* on the basis of alleged direct versus indirect First Amendment infringements. The asserted dinstinction does not help their case. There is no discussion in *McAdory* of any difference between direct and indirect infringement. In *McAdory*, as here, the plaintiffs alleged that a comprehensive labor regulatory statute violated First Amendment freedoms, not because of any particular application of the statute that had been made to the parties before the Court as presented by the record in that case, but because of the possible effect of its criminal penalties and civil injunction remedies. The Court's holding and rationale in *McAdory* control this case. As the Court stated in *McAdory:*

> We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure. 325 U.S. 460-61.

One year later, in *Watson*, the Court refused to entertain a suit to enjoin the enforcement of a right-to-work amendment to the Florida Constitution. In the absence of any specific application of that amendment, this Court held that in passing on the merits "at this stage of the litigation, [the district court] did not follow the proper course." 327 U.S. at 595. The Court's

reasoning is equally applicable to the dispute in the instant case:

> The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation. 327 U.S. at 595-596.

The appellees' assertion that the issues in *Watson* hinged on whether the constitutional amendment was self-executing misses the point. The reason that the district court in *Watson* erred in considering the constitutional issues was that those constitutional issues might never arise. Whether there would ever be a case or controversy depended on unresolved issues of state law. In *Watson,* one of those unresolved state issues was whether the constitutional amendment was self-executing. In the instant case, there are other unresolved state issues, discussed below. The controlling fact is that in both cases a facial attack on an unresolved state statute, in the absence of specific application of the statute, necessarily involves the Court in needless speculation concerning how the statute might be applied and how it might be interpreted. In such a dispute, there is no case or controversy and federal courts lack jurisdiction to resolve it.

Other decisions outside the labor field have substantiated the principle that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma,* 413 U.S. 601, 610-11 (1973). In *California Bankers Association v. Schultz,* 416 U.S. 21 (1974), the American Civil Liberties Union (one of the plaintiffs) sought an injunction on behalf of itself and its bank depositor members against enforcement of certain provisions of the Federal Bank Secrecy Act. The ACLU argued that the Act's reporting provisions could be used to obtain the identities of ACLU members and contributors. This would, of course, be a violation of First Amendment rights. *NAACP v. Alabama,* 357 U.S. 449 (1958). This Court declined to consider the issue for the reason that:

> This Court in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by cases such as NAACP v. Alabama, *supra.* 416 U.S. at 56.

One of the actions involved in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) was *Blanchette v. Connecticut General Insurance Corp.* In those cases, the Court reached the merits of the two major constitutional issues concerning the Federal Rail Act of 1973. In *Blanchette,* however, it declined to pass on the constitutionality of the Act's valuation

scheme, in the absence of a "much more developed record. . . ." 419 U.S. at 146. Quoting from *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71 (1961), the Court stated: "Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality." *Id.* at 145-46.

Even in the absence of a comprehensive statute, this Court has "often declined to decide important questions regarding the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case." *Kleppe v. New Mexico*, 426 U.S. 529, 547 (1976) (quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954)). See also *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975); *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976); and *Mendez v. Heller*, 530 F.2d 457 (2nd Cir. 1976).

The district court relied on a group of lower federal court decisions in purported support of its broadside attack on this statute. (A. 467). Reliance on those cases is misplaced. None involved wholesale, checklist review of a complex, comprehensive regulatory statute. Some of those cases suggest that in some circumstances, federal courts may consider a statutory provision if it has been applied in some other proceedings. Whatever the validity of that proposition in other contexts, it does not apply here. Not one of the five

invalidated provisions has ever been interpreted or enforced in any case in which the parties involved complained of constitutional inadequacies.

The lower court and the appellees also rely on *Doe v. Bolton*, 410 U.S. 179 (1973), and on the generality that the case or controversy requirement is more loosely applied in First Amendment cases. These arguments are wide of the mark. *Doe v. Bolton* involved a single statutory provision and not a comprehensive regulatory statute. In addition, absent a facial attack, the only way that the provision at issue in *Doe v. Bolton* could have been challenged was by the deliberate commission of a criminal act. That is not true in this case.

With regard to the argument that the First Amendment justifies a "roving commission"[23] approach, we know of *no* instance involving a First Amendment challenge or any other in which this Court has entertained an attack on a comprehensive regulatory statute apart from specific involvement of its provisions. *California Bankers Ass'n v. Schultz, supra*, was a First Amendent—indeed, freedom of association—challenge. Yet this Court refused to entertain it. Moreover, as will be discussed in section III of the Argument, First Amendment cases—especially freedom of assembly cases—frequently turn on the facts of the particular case.

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[23] *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973).

It would have been unthinkable, we submit, for this Court to have proceeded in checklist fashion through the provisions of the Wagner Act, or Taft-Hartley, or Landrum-Griffin, deciding the fate of each of the provisions of those statutes in the absence of a record dealing with their actual application. Yet, this is precisely what the district court did. The appellees may contend that the Arizona statute poses a greater threat to individual liberties than does its federal labor law counterpart. We would disagree. But that is not the issue. As noted, this Court has never gone through a comprehensive, multifaceted, regulatory statute in Council of Revision fashion, deciding in the abstract the constitutional acceptability of one provision after another, and then based on conclusions concerning selected parts (in this case five) declared the whole act invalid.

Even the Smith Act and the Subversive Activities Control Act—which had much greater chilling effect than can be alleged of the present statute—were considered as required by Article III: as particular provisions were applied to particular individuals in real situations, the constitutional issues were raised in

the context of those actual applications.[24] Beyond question, the opponents of those statutes would have preferred the type of procedure used by the district court here. But that is not how a judicial system bounded by case or controversy works.

The appellees' contention that there is a case or controversy consists of several parts, none of which is adequate. First, in the appellees' view, the constitutionality of the statute must be judged not just from the viewpoint of the five provisions held unconstitutional by the district court; it must also take into account other provisions concerning whose constitutionality the district court declined to rule. Second, this is an appropriate case for third party standing, so that the union may rely not only on harm to itself and its members, but also to others. Third, it is contended that this statute has already had its effects. One effect is that the appellees have been subject to temporary restraining orders, some without notice. Another is that farm worker wages and working conditions have not been as good in Arizona as in other states; boycott

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[24] Concerning the Smith Act, see *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); and *Dennis v. United States*, 341 U.S. 494 (1951). For cases involving application of the Subversive Activities Control Act, see *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Albertson v. Subversive Activities Control Board*, 332 F.2d 317 (D.C.Cir. 1964), *rev'd*, 382 U.S. 70 (1965); *Communist Party v. United States*, 331 F.2d 807 (D.C.Cir. 1963), *cert. denied*, 377 U.S. 968 (1964); *Communist Party v. McGrath*, 96 F. Supp. 47 (D.D.C. 1951).

activities have been hindered; and the union has lost members, all allegedly because of this statute. Finally, the statute is challenged on overbreadth grounds. This, plus the existence of criminal penalties, removes the need of an actual concrete controversy.

Each of these will be briefly discussed.

A. *Provisions Not Held Unconstitutional by the District Court Are Not Before this Court for Decision.*

The appellees' statement that "it is the enforcement of the whole Act and not just those provisions discussed in the district court's opinion which must be considered when discussing the Article III implications"[25] is essential to the appellees' case. It is also wrong. The appellees asked the district court to pass on the constitutionality of many provisions of the AERA. In fact, the district court ruled on only five. If the case or controversy limitation means anything at all, it must mean that constitutional issues are resolved only as they arise in actual lawsuits. Whether the district court should have decided the other constitutional questions that the appellees requested it to decide must await another litigation, because in this case there is no lower court decision on those issues and no judgment concerning them other than a declination to rule. Even assuming that such a declination were appealable, the appellees have not appealed. Issues pertaining to parts of the Act other than the five

[25] Motion to Affirm 34.

held unconstitutional were not included in the Questions Presented, either by the Jurisdictional Statement or the Motion to Affirm.[26]

Case or controversy jurisdiction to consider the constitutionality of the five statutory provisions held unconstitutional by the district court must rest upon the enforcement of those provisions, and not the enforcement of some others that are not part of this appeal.

B. *The Third Party Standing Doctrine Is Not Applicable; Even If It Were, It Does Not Aid the Appellees' Case.*

The third party standing doctrine is not applicable to a case such as this. There is no indication in the record or elsewhere that if in fact harm results from application of any of the provisions at issue, the harmed party will not be in a position to assert its rights.

Moreover, there is no need to decide whether the third party standing doctrine is applicable to this kind of case. The reason is that of the five provisions invalidated by the district court, the only one that has been applied to anyone is Section 1389. As already noted, the record reflects no constitutional concerns—nor even complaints concerning delay—by any of the parties to those elections. Thus, even if the appellees were entitled to rely on the rights of other people, there is

[26] See Rule 40 1 (d) of the Rules of this Court.

no evidence on this record that anyone has suffered because of the application of any invalidated provision.

C. *None of The Alleged Detriments Suffered by the Appellees Relates to Any of the Five Provisions Held Unconstitutional.*

The appellees assert that "[t]he record also established beyond question that the plaintiffs suffered concrete and definite harm from application of the AERA." Motion to Affirm 35. The purported support is found in highly generalized speculation by Mr. Chavez, reprinted at pages 396 through 400 of the appendix, that boycott effectiveness, wage and hour conditions, and union membership had all declined because of this Act. There were no supporting specifics. Moreover, even if the general expression of opinion by an interested witness were sufficient to establish detriment to the union's interests in boycotts, wages and hours, and union membership, the controlling defect would still remain: under no circumstance can those speculated conditions be laid at the doorstep of the five provisions held unconstitutional because not one of those provisions has ever been applied to any of these plaintiffs. Assuming, arguendo, that Mr. Chavez's speculation may support a case or controversy, we do not know which parts of the statute were the target of his speculation. Whatever they are, they cannot be the invalidated sections, because not one of them has ever been applied to Mr. Chavez, to his union, or to any appellee.

The appellees' principal contention with respect to actual harm is that in three of the secondary boycott cases covered by the Enforcement Stipulation, temporary restraining orders were issued against them without notice or hearing. The district court did not deal with the constitutional sufficiency of any of these *ex parte* temporary restraining orders. Neither did it deal with the validity of the temporary restraining order procedure on its face. If there are constitutional deficiencies, they should be raised in the context of the particular case in which the orders were issued, based on the record in that case, because the notice requirements for temporary restraining orders depend on the facts of the particular case. *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968).

D. *This Is Not an Appropriate Case for Application of the Overbreadth Doctrine.*

Both before the district court and also before this Court, the appellees have asserted that a particularized controversy is not necessary because their challenge is based on the statute's alleged overbreadth, and its criminal provisions.

Despite the repeated assertions that their challenge is based on facial overbreadth, the appellees have not explained how this case can be fitted within the overbreadth rationale. The vice of the overbroad statute is that it interdicts not only prohibitable, but also constitutionally protected conduct. This Court clarified in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) that the constitutional test depends not only on the magnitude of the potential statutory overreach into protected activity, but also on a comparison between the scope of

this potential overreach and the scope of the prohibitable activity. As stated by the Court: "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. At best, the measurement of these twin requirements—that the range of constitutionally protected activity must be real, and that it must be substantial with respect to the prohibitable activity—is difficult. In the absence of a record demonstrating the activity that the challengers in fact undertook in the particular case, it is impossible. In addition, *Broadrick* suggests that its rule may depend on the extent to which "conduct and not merely speech is involved. . . ." *Id.* In an actual case or controversy the record would show the mix of speech and conduct. There is no such record here.

The appellees' offering that "the overbreadth in the AERA is certainly both *real* and *substantial*"[27] is not very helpful. The twin requirements of *Broadrick*—reality and substantiality—are not to be satisfied by a simple self-serving assertion made by parties to litigation. The requirement that the overbreadth be real means that its sweep into constitutionally protected areas must be significant. The companion requirement that it be "substantial as well, judged in relation to the statute's plainly legitimate sweep" is a relative one, comparing the substantiality of statutory overreach to the extent of its applicability to prohibitable activity. Obviously, neither of these factors—the

[27] Motion to Affirm 37. Emphasis in original.

extent of the overreach as an absolute matter, nor the comparison between the statute's overreach into protected activity and its applicability to prohibitable activity—can be measured in the abstract. Both its absolute dimension and also its comparative dimension depend on the particular facts of the individual case. Here, there are no particular facts and there is no individual case.

Section 1392, providing criminal penalties for violations of the Act, has never been enforced. Determination of its constitutionality should await a case involving its application.

The district court's holding that section 1392 is facially unconstitutional rests largely on perceived overbreadth problems. Since the criminal provision has never been applied, it is impossible to know what will be considered a "violation." of the Act. Unfair labor practices, for example, have not been treated as criminal violations. Nor have unlawful boycott activities. Substantively, therefore, this provision cannot be viewed as unconstitutional on its face as the district court held. We recognize that not only falling swords, but also hanging swords, can have an effect. However, the only reason that the district court was able to find a Damoclean effect at all is that it consistently selected the only interpretation of the statute that would raise the constitutional question. In consistently assuming the worst, the district court disregarded the principle stated by this Court in the companion case to *Broadrick, Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 578-79 (1973):

> (T)here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Application of the *Broadrick* test, therefore, depends on the existence of an actual case or controversy. Analysis of this case in light of *Broadrick* shows that here, there is no case or controversy.

II.
EVEN IF THERE WERE A CASE OR CONTROVERSY, THE DISTRICT COURT SHOULD HAVE ABSTAINED, BECAUSE THE CONSTITUTIONAL ISSUES DEPEND ON INTERPRETATIONS OF THE STATUTE.

The lower court's constitutional holdings are laced with necessary rulings as to what the statute means. In each case, the court adopted that view of the statute that would invalidate.

For example:

A. The court's holding that the election procedures are unconstitutional rests mainly on assumptions concerning the time periods that those procedures would consume. One of the assumptions—asserted by the plaintiffs for the first time at trial—is that "the general application of the Arizona Administrative Procedure Act stamps a 20-day

period . . ."[28] between the filing of the election petition and the pre-election hearing. The appellants strongly disagree with this view of Arizona law. Section 1389 C requires "an appropriate hearing on due notice." What is appropriate will vary from case to case depending upon the particular facts of that case. The Legislature having provided for an *appropriate* hearing on *due* notice takes this statute out of the general requirement of the Administrative Procedure Act (AAPA) and permits determination of the needs of the individual case.[29] The district court could not assume that Arizona state courts would interpret the section to require application of the AAPA.

B. Section 1382 1 of the Act defines a permanent agricultural employee as one "over 16 years of age who has been employed by a particular agricultural employer for at least 6 months during the preceding calendar year. . . ." The lower court asserted that the practical effect of this provision was "that a particular worker must be employed during two successive harvests before being entitled to vote." (A. 484) Given the court's view that the constitutional defect in the election procedures rested on time delays and employee transience, the conclusion that the act granted permanent employee status

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[28] District court opinion, A. 483.

[29] The pertinent part of the Arizona Administrative Procedure Act provides: "In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. *Unless otherwise provided by law*, the notice shall be given at least twenty days prior to the date set for the hearing." Ariz. Rev. Stat. § 41-1009 (Supp. 1978) (emphasis added).

only to those who had been employed for two successive harvests was significant. But none of the elections held pursuant to the Act has presented any issue of interpretation of this section. The Board could treat the matter by rule or regulation, but to date it has not. In any event the section has been neither interpreted nor applied by the Board or state courts and the interpretation by the district court in the abstract was improper.

C. The court held unconstitutional the prohibition against dishonest, untruthful and deceptive publicity directed against secondary consumers. Substantial reliance was placed on this Court's observation in *New York Times v. Sullivan*, 376 U.S. 254 (1964) *(Times Libel)*, that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' ". 376 U.S. at 271-72. In *Times Libel*, this Court held that the breathing space requirement is satisfied by the actual malice test. Even assuming, therefore, the correctness of the lower court's determination that the Arizona Legislature's prohibition against dishonest, untruthful and deceptive secondary consumer publicity raises constitutional issues, *Times Libel* would indicate that the constitutional requirements would be satisfied by the knowing falsehood or reckless disregard standard. Whether the statutory prohibition incorporates the *Times Libel* actual malice standard is a question of Arizona law concerning which the Arizona courts have not spoken.

D. The district court held unconstitutional the provision in section 1385 C that "no employer shall be required to furnish or make available . . facilities to enable [a union] to communicate with employees . . ." In support of its holding, the court observed:

> If the grower doesn't have to 'furnish facilities' that clearly means he doesn't have to provide a time or place when the union can communicate with his workers, and thus also means that he does not have to allow them to come onto his property. (A. 496)

Throughout this litigation, the appellants have vigorously disagreed with the foregoing view of this statutory provision. The statute provides that employers are not required to provide facilities. Facilities does not mean real property. It means facilities. It means those items that might be used to facilitate communications, such as microphones, platforms, chairs, etc. It may mean structures or buildings. It clearly does not mean that the employer in all cases may deny access to his property and no Arizona court has so held.

E. This Court held in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), that the NLRB has authority to issue bargaining orders requiring an employer to bargain without a certification election in those instances where employer practices have made it impossible to hold a fair election. This Court has never suggested that *Gissel* rested on constitutional grounds. Nevertheless, the district court found the absence of specific bargaining order authority relevant to the constitutionality of the election procedures under the Arizona Act.

The authority of the Arizona Agricultural Employment Relations Board to issue bargaining orders has been the subject of strong and continuous disagreement between the parties. The Arizona courts have never passed on the issue. Once again, the district court adopted the interpretation that raises rather than avoids the constitutional issue. It interpreted the Act to preclude the issuance of bargaining orders, and that interpretation constitutes part of the premise for its conclusion that the election procedures would be applied in such a fashion as to make them unconstitutional.[30]

F. The district court's holding that section 1393 B violates federal rights to a jury trial guaranteed by the Seventh Amendment and the due process clause is bottomed on that court's view that under the statute the employer "can, without the consent of the union, submit the dispute to binding arbitration by an outsider." (A. 498) No Arizona court has ever interpreted the statute to create such a unilateral right in the employer, and the interpretation is highly questionable. For reasons discussed more fully in Section V of the Argument, the better interpretation is that section 1393 B imposes a compulsory arbitration obligation on the employer as the price he must pay for a ten-day restraining order against strikes or boycotts. The union, not having obtained a restraining order, has no price to pay. If the union wants arbitration, and the employer has obtained a restraining order, there will be arbitration, because the employer is bound to arbitrate. If the union does not want arbitration, there will be no arbitration, because the effect of the restraining

[30] A. 475, 486-87.

order is merely to bind the employer, not the union, which, at that point may elect either to arbitrate or not.

In each of these six instances, the statute could have been interpreted one or two ways. One interpretation would lead to what the lower court considered to be a serious constitutional question. The other would either totally avoid or at least lessen the constitutional concern.

Under those circumstances, the duty of the federal court is clear. It must either (1) adopt that view of the statute that will save rather than destroy[31] or (2) await an interpretation of the State Supreme Court, whose province it is to say what the statute means.[32]

The district court acted directly contrary to these established principles. In each instance, it reached out for the constitutional issue. In each instance it resolved the open question of state law in such a way that the constitutional question was raised rather than avoided.

[31] *United States v. Vuitch*, 402 U.S. 62, 70 (1971). Arizona law is in accord. *Frye v. South Phoenix Volunteer Fire Co.*, 71 Ariz. 163, 170-71, 224 P.2d 651, 656 (1950).

[32] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941); *accord, Elkins v. Moreno*, __ U.S. __, 98 S. Ct. 1338 (1978); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Carey v. Sugar*, 425 U.S. 73, 79 (1976); *Boehning v. Indiana State Employees Ass'n, Inc.*, 423 U.S. 6, 7-8 (1975); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 84 (1975).

In only one instance did the court offer any explanation for this unusual and improper procedure. Concerning section 1385 B 8's prohibition against untruthful secondary consumer publicity, discussed *infra*, pages 58-64, the court's opinion states:

> "Although defendants, as to this particular provision and with so many others, are always proposing the narrowest interpretation possible, and suggesting that this is the way that this, and many other provisions should be interpreted to save constitutionality of the statute, yet, as has been said, where First Amendment rights are involved, this prohibition and this section of the statute involving as it does a prior restraint on free speech must be narrowly drawn. . . . " (A. 490)

At least in the context of the holding related to section 1385 B 8, the court's holding might be understandable if a prior restraint were in fact involved. It is not. There is no record concerning any section 1385 B 8 activity. Holding that provision invalid on its face as a prior restraint assumes that the only way it will ever be enforced is by injunction, and that is not what the statute says. If in fact an injunction were issued under section 1385 B 8 against future dissemination of untruthful publicity, there would be a legitimate prior restraint issue. Absent such an injunction there is no prior restraint issue, and the asserted basis for the court's departure from the well-established rule that statutes must be interpreted so as to save them, disappears.

In the case of its other invalidating interpretations, the district court offered no explanation at all.

III
ELECTION PROCEDURES UNDER THE NLRA AND THE AERA—POLICY CHOICES BY THE LEGISLATURE AND THE JUDICIARY

The election procedures of the Agricultural Employment Relations Act have been characterized both by the district court and also the appellees as "virtually identical to those of the NLRA. . . ."[33]

That characterization is correct.

The chain of reasoning by which election procedures identical to those of the NLRA could be held unconstitutional is as follows:

1. Secret ballot election is the exclusive means by which union recognition can be accomplished under the Act.

2. In some cases, the complete election process, including union organizational activities, will take longer than the harvest season, so that the election itself cannot be held until after the harvest is over, and some of the employees have left.

3. The foregoing combination of factors, where it occurs, may discourage some agricultural workers from engaging in organizational activities. This in turn will result in a denial of their constitutionally guaranteed freedom of association.

This chain of reasoning is three times erroneous: as a matter of fact, as a matter of law, and as a matter of sound judicial and governmental policy.

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[33] District Court Opinion, A. 474. Plaintiffs' Proposed Findings of Fact Submitted to the District Court, p. 8

A. *The Absence in This Case of the District Court's Factual Premise.*

The factual error is in no way linked to any finding of fact that the district court made or that might be inferred from its holding. Rather, it is that as a matter of actual fact—undenied and undeniable—the premise underlying the court's holding is missing in this case.

That premise is that under all circumstances the AERA election procedures will consume sufficient time that the election cannot be held until after the harvest peak when many employees will be gone. All elections under all circumstances are necessarily included, because the court was considering these procedures in the abstract. It did not have the facts of any particular election before it, and its holding was not limited, even as a matter of abstract generality, to elections pertaining to crops with short harvest seasons.

In fact, the record shows that some of Arizona's harvests are not of short duration. The district court found that the citrus harvest, for example, accounts for 22% of agricultural labor in the State, the largest share of any single crop.[34] Yet the citrus harvest lasts virtually all year, from 45 to 49 weeks.[35]

The district court's opinion attempted to deal with the longer citrus harvest by the observation that "[i]n citrus, crews are constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a

[34] A. 471.

[35] A. 370-71, 472.

few days to a few weeks." (A. 472) We know of no support in the record for this statement. Assuming, *arguendo,* its correctness, however, it is irrelevant. Since it is beyond dispute that the citrus harvest lasts most of the year, an employer's crew will return from time to time, affording several opportunities during the year to hold the election.[36]

Similarly, the uncontradicted evidence shows that election procedures under the NLRA frequently deal with short, seasonal employment in a rather substantial number of industries.[37] Indeed, in many of these industries it is agricultural seasonality that limits the period of peak employment.[38]

[36] The significance of possible change in crew make up is discussed in Part C *infra*, page 56.

[37] A. 451-456. See *Ruby Co., dba Shelly Processing Co.*, 129 NLRB 110, 46 LRRM 1510 (1960) (potato processing); *Bordo Products*, 117 NLRB 313, 39 LRRM 1220 (1957) (fruit processing); *Cleveland Cliffs Iron Co.*, 117 NLRB 668, 39 LRRM 1319 (1957) (Great Lakes shipping); *Sebastopol Cooperative Cannery*, 111 NLRB 530, 35 LRRM 1510 (1955) (apple processing); *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950) (vegetable canning); *Alaska Salmon Industry*, 90 NLRB 168, 26 LRRM 1199 (1950) (salmon canning); *S. Martinelli & Co.*, 81 NLRB 1179, 23 LRRM 1361 (1949) (soft drink bottling); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948) (fruit packing); *Foremost Dairies, Inc.*, 80 NLRB 764, 23 LRRM 1129 (1948) (ice cream manufacturer); *Imperial Tobacco Co.*, 74 NLRB 1038, 20 LRRM 1276 (1947) (tobacco drying and processing).

[38] This is true, for example, in the case of the various agricultural packing and canning industries listed in footnote 37.

There is nothing in the district court opinion that would indicate why the problem of short employment periods should rise to the level of constitutional deficiency any more under the Arizona election procedure than under its identical federal counterpart. In fact, to the extent that there is a difference, the difference favors the Arizona law. The reason is that the Arizona Board has greater flexibility to deal with the problems of short peak employment than the NLRB has. The Arizona regulations permit the Board, where appropriate, to defer all questions except questions concerning representation until after the election. Thus, once questions concerning representation have been resolved, the Arizona Board, unlike the NLRB, has the authority to order an election immediately.[39] This effectively gives the Arizona Board the discretion to follow a procedure, where appropriate, that is very similiar if not identical to the California procedure, which the appellees apparently regard as constitutionally required.

What will be the precise effect of an election in which Arizona follows the California model and, by application of its already adopted rule, postpones all questions except representation until after the election? Will such a procedure represent an improvement over the NLRB procedure? Will it in fact be the same as the California procedure which the appellees and the district court apparently contend represents the only constitutionally acceptable model? No one can answer these questions in the abstract. They will be

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[39] See Arizona Agricultural Employment Relations Board Regulations R4-2-19 and R4-2-22. A 539. See also A. 447-51, 456.

properly presented when they arise in an actual case or controversy.

In the meantime, it is readily apparent that the factual prototype—harvest seasons shorter than the election period—cannot be made to fit all cases invalidated by the district court's holding. Even if one were to assume that in some cases the disparity between length of election and length of harvest were so extreme as to infringe on freedom of association, that hypothetical circumstance does not describe this case. This case involves a total invalidation—an invalidation for all harvest seasons.

B. *The Absence of a Constitutional Prohibition Against NLRA-Type Election Procedures.*

Both the district court and the appellees have begged the question of constitutional law. It is clear that membership in a labor union is protected association. *Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5 (1964).* From this accepted premise, the district court and the appellees leap to the conclusion that a secret ballot election procedure assumed to last beyond the employment peak is also violative. The leap is supported by neither analysis nor authority. It is an insufficient basis for interdicting the right of Arizona's legislative policy makers to act in the interest of the people of their state. There is no judicial authority of which we are aware—and the appellees have never cited any—holding that labor union election procedures may raise freedom of assembly issues. It would

be particularly startling to discover than any court had so ruled with respect to election procedures identical to those of the NLRA.

The courts that have considered the nature of the collective bargaining right have held that collective bargaining is of statutory, and not constitutional dimension: "The right to bargain collectively created by the National Labor Relations Act is a public right. The right did not exist prior to the passage of the Act." *Newport News F.F.A. Local 794 v. City of Newport News,* 339 F. Supp. 13, 16 (E.D. Va. 1972) citing *NLRB v. Edward G. Budd Mfg. Co.,* 169 F.2d 571 (6th Cir.) *cert. denied, Foreman's Ass'n. of America v. Edward G. Budd Mfg. Co.,* 335 U.S. 908 (1948). Similarly, "the right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution." *Atkins v. City of Charlotte,* 296 F. Supp. 1068, 1077 (W.D. N.C. 1969). *See also Milton v. City of Atlanta,* 324 F. Supp. 315 (N.D. Ga. 1971). Collective bargaining not being one of the activities of labor unions that enjoys constitutional protection, it follows, *a fortiori* that the election process, being simply one means by which the collective bargaining representative may be chosen, would not raise constitutional issues.

Even if all of these considerations could be ignored, the nearly perfect analogy to the NLRA cannot be. The appellees assert that the district court determined that "NLRA-like election procedures are unsuitable for a unique group like agricultural employees . . . ." Motion to Affirm 12 n.10. Yet neither the appellee nor the district court suggests any reason for the "unsuitability." The only conceivably relevant difference is the length of employment season, but the NLRA must also deal with seasonality problems, and the lower court's holding is by no means limited to cases where seasonality is in fact a problem.

The appellees' real complaint, properly analyzed, is this: in providing collective bargaining rights that did not previously exist, the Arizona legislators did not go as far as the appellees wanted them to go. The impact on organizational, and therefore assembly rights, is that if the legislature had done more than it did, then presumably the union would have been more effective in attracting more members to "associate" with their existing members. Therefore, the appellees' grievance with the Arizona Legislature is not a constitutional grievance. It is simply a disagreement with legitimate policy decisions reflected in the statute. As observed by the district court for the Eastern District of Virginia:

> Furthermore, while the First Amendment protects the right of American citizens to freely associate, it was never intended to provide an affirmative weapon in forcing the state to aid union organizational activities. While a state may be prohibited from penalizing or restricting union activities, the First Amendment imposes no duty on the state to provide services or engage in policies that will affirmatively assist a union to carry out its function and purpose." *Local 995, Int'l. Ass'n. of Firefighters v. City of Richmond,* 415 F. Supp. 325, 326 (E.D. Va. 1976)

The appellees' reliance on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) stands on the same footing. Neither this Court nor any other court of which we are aware—with the exception of the district court in this case—has ever held or even hinted that mandatory bargaining orders under *Gissel* are of constitutional dimension, or that government has an affirmative duty to enact labor legislation providing bargaining orders. Again, the appellees' complaint is that in providing a new collective bargaining procedure the Arizona Legislature did not go as far as the appellees would have preferred.[40]

There could conceivably be a labor election procedure so unfair that its effect on associational interests would render it constitutionally suspect. If in fact election procedures identical on their face to those of the NLRA can ever rise to the level of imposing an impermissible burden on freedom of assembly/association, the time to make that measurement and that determination will be when and if it happens.

This Court's decisions clearly demonstrate that the applicability of freedom of assembly/association principles often turns on variations in the facts of the particular case. *Compare, e.g., Feiner v. New York*, 340 U.S. 315 (1951), with *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Edwards* with *Adderley v. Florida*, 385 U.S. 39 (1966). There is no context in which the facts will vary more from case to case than in agricultural labor. As observed by Mr. Cesar Chavez, National President of the appellee union, "there

[40] This assumes that in fact bargaining orders are not available under the Arizona Act.

isn't anything typical in agriculture. It is all over the map." (A. 405)

Of the provisions held unconstitutional, section 1389 is the only one that has been either interpreted or enforced, as shown by the enforcement stipulation. It is also the only invalidated provision concerning which any substantial evidence was presented at trial. Yet neither the Enforcement Stipulation nor the trial transcript contains any evidence of a single election under the AERA in which actual application of section 1389 has borne out the appellees' speculated fears.[41] This is hardly an appropriate foundation on which to build the first case in history for the proposition that NLRB-type secret ballot labor elections can violate freedom of assembly.

C. *Policy Choices By Legislators And Judges.*

Obviously, peak employment seasons of short duration present special problems. This is true under the National Labor Relations Act, under the California Act, or under the Arizona Act. The optimum solution to those problems is neither readily apparent nor constitutionally mandated. Perhaps the most grievous error committed by the district court was its assump-

[41] The reason that these plaintiffs have not been involved in any AERA election is that since they object to the Act they refuse to use it. A. 400-401. This does not alter the fact that they have had no experience with this section concerning whose effect they could only speculate, nor the further fact that experience with elections under the Act to date has not disclosed a single instance in which time delays were a problem.

tion that the Arizona Legislature was constitutionally limited in its available policy choices to holding the election only during peak employment periods.

There are of course advantages to an inflexible requirement that elections must be held during the employment peak. It permits greater participation during the same season in which the election petition is filed. This basic solution was the one selected by the California Legislature; under its statute, an election must be held within seven days after the petition is filed.[42]

There are also disadvantages to such a system, however. First, it gives the union substantial control over the date of the election. By manipulating the time that it files the election petition, the union can control the date of the election within a maximum leeway of seven days. Second, the California procedure permits the union to organize as long as the union considers it advantageous, and then to limit post-petition campaigning by both sides. Post-petition campaigning is limited to seven days, but there is no limit on pre-petition campaigning by the union. Indeed, Mr. Chavez acknowledged that the reason the pre-petition organizational activities took three to six weeks was

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[42] California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 *et. seq.* Section 1156.3(a) (West Supp. 1978), requires that the Board "shall direct a representation election by secret ballot . . . within a maximum of seven days of the filing of the petition." Under this procedure, it is theoretically possible for the election to be carried by as few as 26% of the peak employment workers. The election must be held when at least 50% of the employees are present, and a majority of those 50% would be 26%. See A. 405-06.

that the union used that period not just to assure that it had enough support to qualify the petition, but also to assure that it had enough support to win the election.[43] A third disadvantage is that in most instances, seven days is too short a period to determine the appropriate bargaining unit. While this and other pre-election issues can be deferred until after the election, it is certainly not an unreasonable legislative decision to conclude that it is more orderly to leave it to the Board's discretion whether to decide these issues before the election is held.

An alternate to the California scheme is the one employed by the NLRB: hold the election during the current season if it is feasible to do so. If it is not, postpone the election until the next peak season, at a date to be determined by the regional director. *Choctaw Cotton Oil Co.*, 84 NLRB 660, 24 LRRM 1307 (1949). This permits the Board to take into account all relevant factors—including the advantages of current peak season elections—rather than restricting the Board to one factor alone. When an industry has two or more seasonal peaks, as is the case with much of Arizona's agricultural production, the delayed representation election is ordered at the time the greatest number of workers is employed.[44] Appellees have not taken issue with the Board's authority to follow the same procedure where appropriate.

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[43] A. 346-50.

[44] See, *e.g.*, *Libby, McNeill & Libby*, 90 NLRB 279, 26 LRRM 1205 (1950); *California Growers, Inc.*, 80 NLRB 578, 23 LRRM 1194 (1948). See also A. 451-56.

Mr. Chavez objected to postponement until the following employment season because the work force might change in the meantime.[45] This argument cuts both ways. To whatever extent it is true, it necessarily means that one group of employees will make representation decisions that will be binding on a significantly different group of employees. This will be true no matter when the election is held. Faced with that kind of situation, the Legislature must have some discretion in making the required policy choices. Certainly the Constitution does not require the Legislature to favor employees who work in the first season—some of whom will not return to be bound by the election decision—over employees in the second season who will be bound.[46]

The approach chosen by the Arizona legislators represents a middle ground between the national model and the California model. Unlike California, Arizona does not mandate a short election period in all cases. Unlike the National Labor Relations Board, however,

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[45] A. 374. He also asserted that some of the pro-union employees might not be rehired. If the reason that they were not rehired is because of their union activity, the appropriate corrective would be an unfair labor practice proceeding against the employer under Ariz. Rev. Stat. § 23-1385 A (Supp. 1978)

[46] Even in California, it is not always possible to hold the election during peak employment periods. A. 366-67, 373-74. In such a case, the California Board has followed the NLRB procedure. Thus, where the California Board found it necessary to order run-off elections because of unavoidable delay resulting from the determination of objections to the conduct of the initial election, it ordered the run-off to be held during the employer's next peak season. *In the Matter of Tenneco Farming Co.*, 3 ALRB No. 20 (1977).

the Arizona Board has the flexibility to employ such a procedure where appropriate. If one assumes the constitutionality of both the NLRA and the California election procedures, it is difficult even as an abstract conceptual matter to perceive how a procedure that permits the flexibility to follow either of these models, depending on which is the more appropriate in the particular case, can be held unconstitutional without regard to how it is applied.

The appellees urge that "the Act must be nullified in all its provisions and returned to the legislature to strike a new balance." Motion to Affirm 32. They also assert that thedistrict court's opinion will foster experimentation by providing "some of the first concrete judicial guidelines", which will permit "a wide variety of union recognition and election procedures in the unique field of agriculture." *Id.* 44-45. These are intriguing comments. Just what new balance is to be struck? What are the concrete guidelines, and what is included within the wide variety of recognition and election procedures that they permit? Apparently the only "new balance" that is constitutionally permissible in the appellees' view is the California procedure. Moreover, the Constitution not only requires that procedure; it requires that it be written into the statute rather than permitted by regulation in those cases where in the judgment of the Board it is appropriate. If the appellees' view prevails, therefore, the "new balance" has already been struck by the district court. There is nothing left for legislative choice.

For over four decades this Court has vigilantly prevented judicial meddlesomeness into legitimate state legislative efforts to deal with important issues.[47] The same problem is presented by this case. Few important policy issues are easily soluble. Labor elections in seasonal industries are no exception. The California Legislature has elected one solution. The National Labor Relations Board has elected another. Arizona policymakers, we submit, are not confined to preferring one of these choices over the other. Neither are they constitutionally precluded from steering a middle course between the two.

IV.
THE PROHIBITION AGAINST FALSE SECONDARY CONSUMER PRESSURES DOES NOT RAISE ANY SERIOUS CONSTITUTIONAL ISSUES ON THE FACE OF THIS RECORD

Section 1385 B 8 of the Arizona Act, held unconstitutional on its face by the district court, makes it an unfair labor practice:

> To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or

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[47] See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Nebbia v. New York*, 291 U.S. 502 (1934). In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976), this Court stated: "That [the state] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

> encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name. (A. 513)

There is no realistic difference between section 1385 B 8 and its federal counterpart in the proviso to section 8 (b) (4) (ii) (B) of the NLRA. The federal proviso authorizes "publicity . . . for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute. . . ." 29 U.S.C. § 158 (b) (4) (ii) (B) (1970). One permits truthful publicity and the other prohibits untruthful, deceptive and dishonest publicity. There is no practical difference—certainly none of constitutional dimension—between authorizing the truthful and prohibiting the untruthful.

In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964) *(Tree Fruits)*, this Court interpreted the proviso in section 8 (b) (4) (ii) (B) of the NLRA to permit a union to apply secondary consumer pressures by picketing as well as by handbilling against the product of an employer with whom the union has a primary dispute. The issue under section 1385 B 8 of the present Act differs from the issue in *Tree Fruits* in two respects, and the differences cut in opposite directions. First, the Arizona provision deals with all secondary consumer pressures,

whereas *Tree Fruits* dealt only with picketing. Second, it does not prohibit all such publicity, but requires merely that it be truthful.

This case does not arise out of specific facts involving any proceeding under subsection B 8. The unfair labor practice defined by that subsection was held unconstitutional on its face. Thus, this provision which so closely parallels its federal counterpart upheld in *Tree Fruits* was held unconstitutional without regard to how it might be applied.

The district court's holding of facial invalidity is subject to three errors, any one of which is sufficient to require reversal.

A. First, the holding rests on the assumption that any possible application of subsection B 8 will always involve a prior restraint. The prior restraint assumption was the only justification advanced by the district court for refusing to interpret the subsection so as to save it rather than invalidate it. The two principal cases upon which the district court relied, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and *A.F.L. v. Swing*, 312 U.S. 321 (1941), both involved prior restraints. The appellees also recognize that their position is based on an assumption of prior restraint. Their second question presented characterizes subsection B 8 as "a statute which calls for prior restraints. . . ." Motion to Affirm 2.

The premise that any conceivable application of subsection B 8 will involve a prior restraint is erroneous. The conduct prohibited by this subsection is an unfair labor practice. As such, it can be dealt with by the Board or by the courts. Neither is limited to pro-

hibiting future activities. Sanctions for past conduct may also be imposed without a future prohibition. Consideration of section 1385 B 8 on its face, therefore, does not raise the prior restraint issue. The time to consider *Keefe* and *Swing* — and the time to consider the correctness of the district court's holding that injunctions or cease and desist orders against future dissemination of false secondary consumer publicity are unconstitutional — will be when, if ever, an injunction or cease and desist order is issued pursuant to this subsection. In six years of the statute's existence, none has issued yet. The prior restraint question was therefore not properly before the district court.

B. Even if the district court's assumption that application of subsection B 8 would always involve prohibition against future conduct were correct, it would still be error to hold that under no circumstances could a prohibition against falsehood in a labor setting be sustained. Holdings in this Court and others indicate that enjoining future falsehoods in a labor setting must rest in the discretion of the trial court, subject to the prerequisites historically required for this equitable remedy, and subject to appellate review.

The district court's total invalidation of subsection B 8, without regard to its application, effectively holds that under no circumstances may government prohibit a union or an employer from distributing false information concerning the dispute between them. That is not the law, and should not be.

It is possible that in the labor setting, falsehood is not entitled even to *Times Libel* protection. The section 8(b)(4)(ii)(B) proviso is instructive in this regard. So also is *United Farm Workers Organizing Committee v. Superior Court*, 4 Cal.3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971), a case brought by the appellee union's predecessor. In that case the California Supreme Court ruled that "Petitioners may properly be enjoined from making false and untruthful statements in connection with a labor dispute." *Id.* at 571; 483 P.2d at 1226; 94 Cal Rptr. at 274. Similarly, in *Corrigan v. Barbers and Beauticians Union, Local 253*, 251 Cal. App.2d 490, 59 Cal. Rptr. 533 (1967), the California Court of Appeals held that the distribution of "false and misleading literature" or the carrying of "false and misleading banners" in a labor dispute may be enjoined.

In *NLRB v. Gissel Packing Co.* 395 U.S. 575 (1969) this Court held the employer to a standard of truth in making statements concerning the impact that union organization would have on its employees. *Gissel* did not involve a prior restraint, but it dispels the notion that in a labor context there is complete license for falsehood. Taken together with the California cases, which involved injunctions, it clearly rejects the district court's holding that any application of A.R.S. section 1385 B 8 would be unconstitutional.

C. Finally, this Court has made it very clear that the maximum First Amendment protection to which falsehood is entitled is that afforded by the *New York Times v. Sullivan*, 376 U.S. 254 (1964) *(Times Libel)*,

actual malice standard. That was the holding in *Times Libel*, and the point was made even more clear in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964):

> [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality ....' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

If the prohibition against untruthful secondary consumer pressures is subject to the same strictures held applicable in *Times Libel*, then the first task of the federal judiciary should be to determine whether the *Times Libel* actual malice test applies to this statute. In *Elfbrandt v. Russell*, 384 U.S. 11 (1966), this Court took into account the Arizona Supreme Court's interpretation of the knowledge or intent requirement applicable to Arizona's loyalty oath. A no lesser opportunity should be afforded in connection with this statute, which has significantly greater impact on the people of Arizona. Similarly, the interpretation of the statute in *Tree Fruits* by a majority of this Court was influenced at least in part by the principle that statutes should be interpreted, if possible, so as to make

them constitutional.[48] The Arizona courts should be given the same opportunity.

The question of knowing or reckless disregard is a question of fact. It cannot be assumed that false statements will never be made with knowledge of or reckless disregard for their truth or falsity. Neither can it be assumed that under no circumstance would the Arizona courts permit a *Times Libel* defense.

V.
COMPULSORY ARBITRATION, SUBSTANTIVE DUE PROCESS, AND INCORPORATION OF THE SEVENTH AMENDMENT

Understandably, the appellees attempt to avoid the fact that the district court has held the Seventh Amendment incorporated into the Fourteenth, contrary to the unanimous voice of decisions in this and other courts.[49] Thus, the appellees point out that the district court "does not even mention or discuss the 'incorporation' of the Seventh Amendment . . . " Motion to affirm 28.

Whether the district court intended to raise the incorporation issue is immaterial. Whether stated in the opinion or not, the lower court has necessarily held the Seventh Amendment binding on the states. It held,

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[48] 377 U.S. at 63.

[49] See headnote 12 to the annotations to the Seventh Amendment in United States Code Annotated for citations to the relevant cases. For illustrative holdings, see *Olesen v. Trust Company of Chicago*, 245 F. 2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.) *aff'd*, 409 U.S. 943 (1972); *U-Haul Co. of Alabama v. State*, 316 So.2d 685 (Ala. 1975); *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670 (1975).

"We therefore strike down this section of the statute, A.R.S. § 23-1393(B), as unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution and the Seventh Amendment providing for right to trial by jury." (A. 499) Similarly, the appellees assert that, "clearly no state can attempt to remove the resolution of such disputes from all court jurisdiction, including federal courts, without violating federal rights to a trial by jury." Motion to Affirm 28. Where are these "federal rights to a trial by jury" found? The only "federal rights to a trial by jury" that rise to the level of constitutional guarantee in a civil case are found in the Seventh Amendment, as the district court recognized. These Seventh Amendment rights are not binding on the states unless either (1) the Seventh Amendment directly applies to the states, thereby overruling *Barron v. Baltimore*, 7 Pet. 243 (1833) or (2) the Seventh Amendment is incorporated into the Fourteenth.

Neither does the due process clause provide adequate foundation for invalidation of the arbitration provision. The "clear denial of due process"[50] to which the district court refers is substantive due process. The cases on which its opinion relies are substantive due process cases from the substantive due process era. The principal case *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923), was decided just two months after *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) and relied on *Adkins* as authority. Moreover, there is no other aspect of due process on which the district court's

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[50] A. 498.

decision could rest. Neither the lower court nor the appellees point to any procedural defect raised by the so-called compulsory arbitration provision. Rather, it is that as a matter of substance the district court characterized this provision as "depriving parties of liberty and property without due process of law . . . ." (A. 498)

This Court has made it very clear that the substitution of judicial policy-making for legislative policy-making under the aegis of due process is no longer acceptable. *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1952). This principle clearly applies to binding arbitration of labor disputes. *Country-Wide Insurance Company v. Harnett,* 426 F. Supp. 1030 (S.D.N.Y.), *aff'd.* 431 U.S. 934 (1977) involved a challenge to the compulsory arbitration provisions of New York's "No Fault" insurance Law. The basis of the challenge, and the reasons for its insufficiency were the same as in this case. As stated by the three-judge district court opinion in *Country-Wide:*

> Arbitration is a reasonable alternative to a judicial determination of insurance claims and, at least so long as no fundamental rights are involved, the state may choose to provide any rational method of dispute settlement that comports with the basic procedural safeguards required by due process. Cf. *Goldberg v. Kelly,* 397 U.S. 254, 266-71, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).
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> Plaintiff relies on *Wolff Packing Co. v. Indus. Court,* 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Dorchy v. Kansas,* 264 U.S. 286, 44 S.Ct.

> 323, 68 L.Ed. 686 (1924), and *Wolff Packing Co. v. Indus. Court,* 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785 (1925). These cases held that attempts to fix wages and compel arbitration were constitutionally impermissible because the industries there (*i.e.,* meat packing and coal mining) were not sufficiently 'clothed with a public interest', to justify these regulations. This 'public interest' standard was expressly rejected in *Nebbia v. New York* . . . .
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> . . . .
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> The Court has steadily rejected the substantive due process approach exemplified by *Wolff* and *Dorchy,* espousing a constitutional doctrine under which 'the due process clause is no longer to be so broadly construed that * * * state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.' *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.,* 335 U.S. 525, 536-37, 69 S.Ct. 251, 257, 93 L.Ed. 212 (1949). 426 F. Supp. at 1032-1033.

Moreover, the district court's opinion assumes that this provision[51] gives the employer the unilateral right to compel arbitration. It is not at all apparent that the Arizona courts would interpret the statute to give the employer such a right. The statute imposes a compulsory arbitration obligation on the employer in the event that he seeks a ten-day injunction, but it does not impose such an obligation on the union, and it was improper for the district court to assume that the Arizona courts would so interpret it. The effect of this provision is that an employer who obtains a ten-day restraining order under this statute must pay a price: he must agree to submit the dispute to binding arbitration. The district court apparently based its conclusion on the sentence in the statute providing that "in the event the parties cannot agree on an arbitrator within two days after the Court awards a restraining order, the Court shall appoint one to de-

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[51] Section 23-1393(B) states in relevant part:

In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues.

cide the unresolved issues."[52] This sentence does not impose a compulsory arbitration obligation on the union, however; it merely provides a procedure in the event the union elects to take advantage of the employer's statutory obligation to arbitrate, but the parties are unable to agree on an arbitrator. In any case, it was clearly improper for the district court to assume a unilateral right in the employer to invoke compulsory arbitration.

VI.
THE DISTRICT COURT'S HOLDING CONCERNING ACCESS TO FACILITIES IS BASED ON THREE ERRONEOUS ASSUMPTIONS

The district court held section 1385 C, dealing with the employer's "materials, information, time or facilities", (A 515) unconstitutional in light of the testimony and evidence. It is true that any constitutional issues possibly raised by this section can be determined only in the light of facts. The kind of facts required, however — even assuming that the Arizona courts would construe the section as the district court did, adverse to its constitutionality — are not part of this record.

The leading case dealing with union organizing activity on employer premises under the National Labor Relations Act is *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956). In that case the Court treated the problem as one of statutory rather than constitutional dimension. The Court clarified the requirements of section 8 (a)(1) of the NLRA in this respect:

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[52] *Id.*

> It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees* with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. 351 U.S. at 112. (emphasis added).

This Court further observed in *Central Hardware Co. v. NLRB,* 407 U.S. 539, 543 (1972), that "[t]he Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two."

There is no suggestion in *Babcock and Wilcox* or *Central Hardware* that the requirements of section 8(a)(1) represent a constitutionally irreducible minimum. This point was reemphasized by *Hudgens v. NLRB,* 424 U.S. 507 (1976), involving striking members of a union picketing in front of their employer's store located in a shopping center. The Court observed that, "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act." *Id.* at 521.

Even assuming that the section 8(a)(1) standards were constitutionally required, and assuming further that the Arizona courts would interpret facilities to mean premises, the unmistakable teaching of this Court's holdings is that union access to employer premises depends on the facts of the particular case. Specifically, the pertinent facts are the availability of other channels of communication, and whether the employer has discriminated against the union by allowing other distributions. There is of course no

evidence concerning these issues on the record in this case, because the case does not involve any specific application of the provision in question.[53]

Despite its assertion that its ruling on section 1385 C was in light of the evidence, the district court's only factual determination related to this provision is its reference to "testimony and other evidence and really not disputed by defendants that the vast majority of farm workers are migratory and generally reside in areas or labor camps located on property owned by the employer ...." (A. 493). This assertion is not supported by the evidence (See A. 402-05, 406) and is "disputed by defendants." Far more important, however, the controlling facts do not concern where the

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[53] Indeed, though the district court declared that its holding concerning this subsection was one of the two provisions in connection with which evidence needed to be considered, (A. 462) the court did not list Section 1385 C as one of the provisions as to which evidence was presented. The opinion states: "Evidence presented during the four day trial was introduced relative to A.R.S. §§ 1384, 1385(A) (5), 1385 (B) (11), 1385(D), 1389, and on the plaintiffs' claim that the exclusion of stitchers and haulers and sixteen-year olds from the AERA, § 1382(1) and 382(1) (g), was a violation of the Equal Protection Clause as well as a similar claim that exclusion of those farm workers who did not work for the same employer the previous calendar year from presentation elections was likewise a violation of the Equal Protection Clause." *Id.* at 461-62.

workers live, but whether there are adequate alternative means of communication, and whether the employer has discriminated.[54]

The appellees concede that "Since the existence of adequate alternative means of communication will vary from case to case, that determination must be left for the appropriate Board or court to determine in each instance." Motion to Affirm 25. Having made that concession, the appellees rest on the assertion that "the Arizona legislature has left no room in § 23-1385(C) of the AERA for such accommodation and balancing between these competing interests." *Id.* This assertion is essential to the appellees' position, but it is wrong. The availability of other means of communication depends on the individual facts of particular cases, and not on the language of the statute. This statute does not say that under no circumstances may alternatives be permitted. As the statute is applied, there will doubtless be some farms and some employment situations where the alternate communication channels are adequate. There may be others where they are not. That determination must await the facts

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[54] The district court's suggestion that Section 1389 I somehow forecloses alternatives is obviously wrong. Section 1389 I deals only with the employer's obligation to furnish a list of employees in connection with an election. It has nothing to do with alternative means of communication, which would vary from case to case, depending on such physical circumstances as the layout of the employer's property, the employer's attitudes concerning the use of that property, and other nearby property that might be used for publicity purposes.

of actual cases or controversies. Once again, the problems attendant upon adjudication in the abstract are apparent.

The district court's holding necessarily rests on three assumptions: (1) that under Arizona law facilities does not mean facilities, it means premises; (2) that the *Babcock and Wilcox* standards are constitutionally required; and (3) that under all circumstances in which section 1385 C will be applied, the employer will violate the requirements that there be other available channels of communication and that there be no discrimination against the union by allowing other distribution.

If any one of these three assumptions falls, so also must the district court's holding concerning section 1385 C. All three are erroneous.

VII.
THE DISTRICT COURT ERRED IN CONCLUDING THAT CONSTITUTIONAL DEFECTS IN PARTS OR ALL OF FOUR SECTIONS REQUIRED INVALIDATION OF THE ENTIRE ACT.

The AERA consists of fifteen sections. It prohibits twenty unfair labor practices. The five provisions found constitutionally defective include one of the twenty unfair labor practices, two of the fifteen sections, and parts of two others.

Of these fifteen sections, the district court held that only two were totally invalid. (One of these, section 1392 dealing with criminal penalties, the court conceded to be severable.) (A. 468) It also found

constitutional defects in parts of two other sections.[55] The court therefore declined to find constitutional defects in the great majority of the statutory provisions, including many vigorously attacked by the appellees. Nevertheless, the entire Act was held unconstitutional.

This wholesale invalidation flies in the face of common sense and the square holdings of this Court. The point is best illustrated by the unfair labor practice provisions. The Arizona Legislature has concluded that the twenty practices described in subsections 1385 A and B are inimical to state policy. Each represents a separate policy determination. They include such practices as employer interference with his employees' rights to join and participate in union activities, employer domination or interference with the formation or administration of labor organizations, secondary boycott activities, union picketing of an employee's home, and violent conduct for the purpose of preventing the marketing of agricultural products. Before the district court, the appellees advanced constitutional challenges to six of the twenty unfair labor practices, parts 6, 7, 8, 11, 12, and 13 of Section 1385 B. The court ruled in their favor on only one of the six, Section 1385 B 8. Despite the court's declination to accept the appellees' arguments concerning five of the six challenged unfair labor practices, the appellees have succeeded in invalidating not only the remaining five,

[55] Two of the five invalidated provisions are parts of the same Section, 1385, B 8, prohibiting untruthful, etc. secondary consumer pressures, and 1385 C dealing with access to employer facilities.

but also the fourteen that they did not even challenge. This includes the prohibitions against *employer* unfair labor practices, which are no more dependent on any of the invalidated provisions than if they appeared in a separate statute. Six of the twenty cases brought under the Act as of January of 1977 were unfair labor practice proceedings. (See Enforcement Stipulation. A. 79) None of those cases depended in any way on the existence of any of the five invalidated provisions. The State has a legitimate interest in continuing to prohibit and punish unfair labor practices, either by employers or by unions.

The district court's only justification for its broadside interdiction of the statute is contained in two sentences. In its discussion of the election procedures, the court asserts that: "If [Section 1389, dealing with elections] fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible." (A. 482). Similarly, at the conclusion of its opinion the court states that its holding concerning election procedures, "coupled with the other sections struck down, results in a complete perversion of the expressed intent of the Legislature to allow agricultural employees to 'be free to organize, take concerted action and, through representatives of their own choosing, enter into collective bargaining agreements establishing their wages and terms and conditions of employment . . . .' " (A. 499)

The factual error of these *a priori* assertions is readily demonstrable. In addition, they represent a total failure even to consider, much less apply, the standards for severability prescribed by this Court. Each of these errors warrants brief discussion.

Concerning the factual error, it is nothing less than astounding that in concluding that the elimination of the five sections held unconstitutional would result "in a complete perversion of the expressed attendant legislature . . " the court would select just one phrase from the legislature's Declaration of Policy, and declare that single phrase to be the statutory purpose. There were many purposes, as shown not only by the Declaration of Policy,[56] but even more by the structure of the Act.

Very simply, the proscriptions against employers' making financial contributions to a union, or against a union's picketing an employee's home, stand on their own as policy determinations by the Arizona Legislature. They do not depend on election delays, arbitration, untruthful secondary consumer picketing, or union access to employer facilities. Even if the district court were right as to the five provisions held unconstitutional, the legislative determinations remain that Arizona needs an agricultural labor board; that that board needs authority to conduct investigations, issue subpoenas, hold hearings, order reinstatement and back pay, and issue cease and desist orders concerning 19 uninvalidated unfair labor practices; that even though the bargaining representative cannot be chosen by the employees in a secret ballot election as

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[56] A. 504.

determined by the Legislature, the collective bargaining process should be conducted according to law; that contracts resulting from collective bargaining are entitled to statutory protection; that physical threats against consumers should not be permitted; and so forth.

Even if the district court's perception concerning legislative purpose were correct, it clearly failed to apply the proper standards for severability. The general rule was stated by this Court in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932), as follows:

> The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

This rule from *Champlin Refining Co.* has been restated by recent cases, and appears to represent the most authoritative general statement of the law of severability. See *Tilton v. Richardson*, 403 U.S. 672, 684 (1971); *United States v. Jackson*, 390 U.S. 570, 585 (1968). The appellees purport to derive from *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, 313 (1936) a rule "that the absence of a statutory provision for severability creates a presumption against severability." Motion to Affirm 30. Today, that proposition is about as firm as the principal holding in *Carter v. Carter Coal Co.* In *United States v. Jackson*, this Court declared that "whatever relevance such an explicit [severability] clause might have in creating a presump-

tion of severability . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause. Thus, for example, the Court in *Champlin*, after stating the basic test quoted above, cited cases in which invalid statutory provisions had been severed despite the absence of any provision for severability." 390 U.S. at 585 n.27. *Tilton v. Richardson*, *supra*, demonstrates that the presence or absence of a severability clause is not a major issue: "Nor does the absence of an express severability provision in the Act dictate the demise of the entire statute." 403 U.S. at 684.

This Court further observed in *Tilton* that:

> The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value. This circumstance does not require us to invalidate the entire Act, however. 'The cardinal principle of statutory construction is to save and not to destroy.' *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 . . . . 403 U.S. at 683-84.

Therefore, whether *Carter v. Carter Coal Co.* ever stood for the principle advocated by the appellees is not important. What is important is that this Court has integrated its approach to the severability issue into the larger principle that statues should be interpreted so as to save rather than destroy.

CONCLUSION

From the narrow perspective of this case, we would welcome a decision on the merits. The case is here, the statute is important, and the district court obviously erred. As one of the sovereign states in a federal union, however, the State of Arizona has a broader and more important interest at stake, the preservation of the principle that federal court jurisdiction is limited to cases or controversies.

In either case, the judgment of the district court must be reversed.

Respectfully submitted,

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